OCBC BANK (MALAYSIA) BHD

v.

LEAN SENG POTTERY FACTORY SDN BHD

HIGH COURT MALAYA, IPOH
ABDUL HAMID EMBONG J
[ORIGINATING SUMMONS NO: 24-320-1998]
4 MARCH 1999

CIVIL PROCEDURE: *Adjournment - Notice of appointment of adjourned hearing - Whether must be served on defendant - Rules of the High Court 1980, O. 83 r. 2(1) & (4) - Whether applicable when defendant has not entered appearance*

LAND LAW: *Charge - Notice of demand - Form used by chargee and incorrect insertion of chargor's account number - Whether rendered notice defective*

LAND LAW: *Charge - Interest - Variation of interest - Whether chargee was given notice of variation*

LAND LAW: *Charge - Order for sale - Cause to the contrary - Whether established - National Land Code 1965, s. 256(3)*

Before the hearing of this order for sale application, the defendant ('chargor') raised two preliminary objections: (1) that the plaintiff bank ('chargee') had not served him notice of the adjourned hearing under O. 83 r. 2(4) of the Rules of the High Court 1980 ('RHC') and cited the Federal Court case of *Muniandy Thamba Kaundan & Anor v. D & C Bank* in support; and (2) that the demand notice under Form 16E given by the chargee was the wrong form and as such defective.

At the hearing, the issues were: (1) whether the chargee had failed to notify the chargor of the variation of interest as required under cl. 3 of the Annexure to the charge; (2) whether the wrong account number used in the demand notice rendered it defective; and (3) whether the chargor succeeded in establishing the existence of any cause to the contrary by virtue of s. 256(3) of the National Land Code 1965 ('NLC') to justify the withholding of the order for sale.

Held:

[1] The adjourned hearing date was but a continuation of the earlier date when both counsels for the parties had appeared. The purpose of the

notice of appointment under Order 83 r. 2(4) of the RHC is to ensure that a chargor who has **not** entered an appearance be served with a fresh notice of appointment together with any further affidavit to appear at the adjourned hearing.

[1a] Counsel for the chargor herein already had this notice when the case was first fixed for hearing on 7 October 1998 and had in fact also appeared before this court on 13 November 1998 when the matter was adjourned. He could not now be heard to complain that he had no notice of the adjourned hearing or to insist that the chargor be served with a fresh notice of appointment. The order of this court on 7 October 1998 to have the case adjourned to 13 November 1998 would suffice as a valid notice to both parties. The chargor was in no way prejudiced by the failure of the chargee to serve him anew.

[1b] *Muniandy*'s case was decided on a strict application of O. 83 r. 2(4) of the RHC. This rule must not be read in isolation but construed in the context of r. 2(1) which states that "… any defendant fails to enter an appearance, the following provisions of this rule shall apply …" . Rule 2(4) should therefore be applicable to an instance where the defendant has not entered an appearance. It is, thus, not meant for a universal application. The facts in *Muniandy* confirmed this wherein the appellants had not entered an appearance although they had attended court in persons. The chargor herein had entered an appearance on 4 June 1998 and had attended court through counsel on 7 October 1998. As such, r. 2(4) was not applicable.

[2] Where there was a demand for payment of principal and interest, Form 16E could be used as well as Form 16D. Further, Form 16D was the appropriate notice if the principal sum was payable on demand and the chargee therein was also seeking to recover the interest which had become due and payable. As such, Form 16E notice of demand used by the chargee herein was quite proper, valid and effectual, and in substance the chargor had not been misled by the demand made in the said notice.

[3] The notices sent to the chargor were sufficient notices of the changes in the interest rates. Further, the monthly accounts sent to the chargor also notified the chargor of the periodical variations on the interest rate. On the chargor's contention that there was no proof that it had received those notices, the address used clearly showed that it was the chargor's current address and that there had not been any query or complaint by

the chargor previously that it had not received the notices or monthly statements sent to that address. Also, the chargor had not notified the chargee of any change in its correspondence address.

[4] The defect in the demand notice was obviously a typing error which might be overlooked if it would produce unfairness or result in manifest injustice to the chargee.

[5] Under s. 256(3) of the NLC, the onus is upon the chargor to show the existence of any cause to the contrary justifying the withholding of an order for sale where to make one would be contrary to some rule of law or equity. However, this does not extend to a situation where the court would refuse the relief because it felt sorry for the borrower. The chargor has to adduce sufficient evidence by affidavit in order to discharge this onus.

[5a] If no cause to the contrary is shown, the court will be obliged to make an order for sale. Section 256(3) of the NLC should be given a narrow and restrictive interpretation in order to give full effect to the legislative intent under s. 256 of the NLC. The duty of a judge hearing a sale application when examining the evidence said to raise a cause to the contrary is to objectively assess the factual materials and merely say whether they constitute such cause to the contrary. Therefore, this court ought not enter upon a discussion of the question whether any or all these complaints have or are devoid of any merit. Further, the chargor who fails to show cause to the contrary is not left without any remedy as the chargor may have an action *in personam* against the chargee.

[5b] In this instance, the chargor had failed to adduce sufficient materials to justify the withholding of an order of sale. As such, the chargee should be allowed the early recovery of its moneys due and realise its security through its application for an order for sale.

[Preliminary objections dismissed; application for order for sale granted.]

Cases referred to:

Arab-Malaysian Credit Bhd v. Tan Seang Meng [1995] 1 CLJ 773 ***(refd)***
Eliathamby v. Sheikh Mohamed bin Said [1970] 2 MLJ 194 ***(refd)***
Jacob v. OCBC Ipoh [1974] 2 MLJ 161 ***(refd)***
Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1984] 1 MLJ 457 ***(refd)***
KSM Insuran Bhd v. Amanah Chase Merchant Bank Bhd [1992] 2 CLJ 1148 ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 ***(foll)***
Mary Michael v. UMBC Bhd [1971] 2 MLJ 173 ***(refd)***

Muniandy a/l Thamba Kaundan & Anor v. D & C Bank Bhd [1996] 2 CLJ 586 ***(dist)***
Overseas Union Bank Ltd v. Chuah Ah Sai [1969] 3 MLJ 503 ***(refd)***
Overseas Union Bank Ltd v. Lee Guat Cheow & Co Sdn Bhd [1987] 1 MLJ 51 ***(refd)***

Legislation referred to:
National Land Code 1965, s. 256, (3)
Rules of the High Court 1980, O. 83 rr. 2(1), (4)

For the plaintiff - Silvanathan (Thangasvari with him); M/s Kean Chye & Sivalingam
For the defendant - Manjeet Singh; M/s Paramjit & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Hamid Embong J:

In this order for sale application, the defendant (chargor) at the outset raised two preliminary objections; namely –

1. That the plaintiff bank (chargee) had not served him with a proper notice of the adjourned hearing date under O. 83 r. 2(4) Rules of the High Court 1980 (RHC).

Learned counsel for the chargor cited the case of *Muniandy a/l Thamba Kaundan & Anor v. D & C Bank Bhd* [1996] 2 CLJ 586; [1996] 1 MLJ 379 in support of his contention that the chargee was under an obligation to serve notice of the adjourned hearing. In that case an *ex parte* order for sale was made on the postponed date ie 29 January 1992 in the absence of the appellants, although the appellants, who did not enter an appearance, had previously attended court in person on 30 October 1991 when the matter was adjourned. Learned counsel for the chargee submitted that *Muniandy's* case could be distinguished in that, there, the appellants were ignorant laypersons, unlike in this case where the chargor was represented by counsel who had himself appeared. On 7 October 1998 when this case was first fixed for hearing, learned counsel for the chargor had appeared, and the case was adjourned to 13 November 1998 to allow the chargee to file an affidavit in reply to the chargor's affidavit. The same counsels for both parties appeared and argued the case on the adjourned date. I do not see any necessity for a fresh notice of appointment to be served on the chargor for the adjourned hearing. In my view, the adjourned hearing date was but a continuation of the earlier date when both counsels for the parties had appeared. The purpose of the notice of appointment under O. 83 r. 2(4) RHC is to ensure that a chargor who had not entered an appearance be served with a fresh notice of appointment together with any further affidavit to appear at the adjourned

hearing. Counsel for the chargor already had this notice when the case was first fixed for hearing on 7 October 1998 and had in fact also appeared before this court on 13 November 1998 when the matter was adjourned. He cannot now be heard to complain that he had no notice of the adjourned hearing or to insist that the chargor be served with a fresh notice of appointment. The order of this court on 7 October 1998 to have the case adjourned to 13 November 1998 would suffice as a valid notice to both parties. Against this background, to serve the chargor with a fresh notice of appointment would be superfluous. Certainly the chargor was in no way prejudiced by the failure of the chargee to serve him anew.

Muniandy's case was decided on a strict application of O. 83 r. 2(4). This rule reads –

> Where the hearing is adjourned, then, subject to any directions given by the Court, the plaintiff must serve notice of the appointment for the adjourned hearing, together with a copy of any further affidavit intended to be used at that hearing, on the defendant not less than 2 clear days before the day fixed for the hearing.

This rule however must not be read in isolation but construed in the context of r. 2(1) which states –

> Where in a charge action begun by originating summons, being an action in which the plaintiff is the chargee and claims delivery of possession or payments of moneys secured by the charge or both, **any defendant fails to enter an appearance, the following provisions of this rule shall apply, and references in those provisions to the defendant shall be construed as references to any such defendant**. (emphasis added)

In my considered view, r. 2(4) should therefore be applicable only to an instance where the defendant had not entered an appearance as the words emphasised by me in r. 2(1) above clearly mean. r. 2(4) is thus not meant for a universal application. The facts in *Muniandy* confirmed this, where, in that case, the appellants had not entered an appearance although they had attended court in persons. In the instant case the chargor had entered an appearance on 4 June 1998 and had attended court through counsel on 7 October 1998, and as such, r. 2(4) is not applicable.

The situation in this case was therefore entirely different from the circumstances in *Muniandy's* case to which r. 2(4) applied and where it was held that the appellants were deprived of the rule of natural justice under the maxim *audi alteram partem.*

This objection by counsel for the chargor, therefore, was dismissed.

2. That the demand notice under Form 16E given by the chargee was the wrong form and as such the notice was defective.

Learned counsel for the chargor submitted that the demand was for both principal sum of RM255,000 being credit facilities given to the chargor and for further interest of RM25,206.59 accruing as at 14 January 1998. Learned counsel argued that a demand coupling both principal and interest should be by way of Form 16D and not Form 16E as was used here. Thus, the demand notice was bad and a cause to the contrary had been shown. Learned counsel cited the cases of *Eliathamby v. Sheikh Mohamed bin Said* [1970] 2 MLJ 194 and *Mary Michael v. UMBC Bhd* [1971] 1 MLJ 173 in support of his contention.

Learned counsel for the chargee contended that it was valid and effectual for a demand to be made in either form and cited *Jacob v. OCBC Ipoh* [1974] 2 MLJ 161, in support. There the Federal Court held that where there was a demand for payment of principal and interest, Form 16E could be used as well as Form 16D and that the demand may be made in either form. Suffian LP in his judgment also stated –

> The language of subsection (1) of section 255 would seem to indicate that if the chargee had made its demand by using Form 16E it need not have followed it up by also serving notice by Form 16D, but that if it did not first use Form 16E it would be alright if it used only Form 16D. The object of the legislation is to see that sufficient notice is given to the chargor before the chargee applies for an order of sale, and in my judgment here the chargee has given the chargor sufficient notice before coming to court.
>
> During the course of the argument counsel for the chargee said that Form 16D was used because this was a demand for principal and interest, and that Form 16E was appropriate where there was a demand for principal only, probably because it is headed "Demand for payment of a principal sum". With respect I do not think it correct to say that if you demand principal and interest you use Form 16D, but if you demand principal only, you must use Form 16E. In my view, as neither section 254 nor section 255 uses the word "interest", interest may be claimed by either form.

The case of *Mary Michael (supra)* did not decide the converse. It merely held that Form 16D was the appropriate notice if the principal sum was payable on demand and the chargee was also seeking to recover the interest which had become due and payable. Azmi LP made the following observation on a notice under Form 16E –

> A notice in Form 16E is both a notice of demand for payment as well as a notice that in default of payment within one month of the service of the notice the chargee will apply for an order of sale. This is clear from the working of

section 255(1) of the Code which says that in such a case no further notice in Form 16D is required. In other words, whereas Form 16D can be used whether or not the principal sum is payable on demand Form 16E can be used only if the principal sum is payable on demand.

I therefore hold, from the authorities mentioned above, that the Form 16E notice of demand used by the chargee here was quite proper, valid and effectual, and in substance the chargor had not been misled by the demand made in the said notice.

This objection was also dismissed.

The hearing was then adjourned to 13 January 1999 for argument on the merits. When it resumed learned counsel for the chargor raised two further issues, namely –

1. That the chargee had failed to notify the chargor of the variation of interest by notice in writing as required under cl. 3 of the annexure to the charge.

As such, it was contended, the interest rate should remain at 1.5% above the base lending rate which was at 7% per annum at the time the charge was executed and not at 3% above the current base lending rate of 13.45% per annum as was demanded. In reply, learned counsel for the chargee referred to the notices sent to the chargor (Exhs. 'CKT 5A & 5B' in encl. 14) wherein periodical variations to the interest rates were informed. I am satisfied, having examined those notices in Exhs. CKT 5A and 5B that the chargor was given sufficient notices of the changes in the interest rates. Further, as was submitted by learned counsel for the chargee, and with whom I agree, the monthly accounts sent to the chargor also notified the chargor of the periodical variations on the interest rate. I also do not accept the chargor's contention that there was no proof that they (the chargor) had received those notices. The address used clearly showed that it was the chargor's current address and there had not been any query or complaint by the chargor previously that they had not received the notices or monthly statements sent to that address. Furthermore, the chargor had not notified the chargee of any change in its correspondence address. This contention was therefore clearly without any basis.

2. Wrong account number used in the demand notice.

Next, the chargor adverted to the account number stated in Form 16E, typed as 720-104822-1. Counsel for the chargor submitted that since the overdraft account of the chargor was 721-104822-1, this defect in the demand amounted to a cause to the contrary within s. 256(3) of the National Land Code (NLC). For the chargee, it was argued that the chargor held only one account ie No.

721-104822-1, and all notices and statements given to the chargor had the correct account number stated. There was obviously a typing error in Form 16E, but it was contended that the chargor had not been misled by this error as it knew that it operated only one account with the chargee and further, Form 16E itself carried a schedule of the various charges. It is my view that the court may overlook this error as one which, if pedantically approached, would produce unfairness or result in manifest injustice to the chargee (see *Arab-Malaysian Credit Bhd v. Tan Seang Meng* [1995] 1 CLJ 773; [1995] 1 AMR 741).

Under s. 256(3) NLC, the onus is upon the chargor to show the existence of any cause to the contrary (see *Overseas Union Bank Ltd v. Lee Guat Cheow & Co Sdn. Bhd.* [1987] 1 MLJ 51), now construed as justifying the witholding of an order for sale where to make one would be contrary to some rule of law or equity but not extending to a situation where the court would refuse the relief because it felt sorry for the borrower (see *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor* [1984] 1 MLJ 457. It goes without saying that the chargor has to adduce sufficient evidence by affidavit in order to discharge this onus. In *Overseas Union Bank Ltd v. Chuan Ah Sai* [1969] 3 MLJ 503, Mohammed Dzaiddin J (as he then was) went one step further when he held –

> Pada pendapat saya oleh kerana tugas membukti (onus) bahawa terdapatnya 'the existence of cause to the contrary' ... dikenakan kepada pihak defendan, maka tidaklah memadai bagi pihak tersebut hanya membuat bantahan awal. Adalah menjadi kewajipan pihak defendan membuktikan akan adanya 'cause to the contrary' dengan secara afidavit dengan mencatitkan di dalam afidavit butir-butir menunjukkan merit... .

In that case the defendant had raised, by way of preliminary objection, the point of an improper issuance of Form 16D by the plaintiff bank which the learned judge held to be insufficient to prove the existence of a cause to the contrary. That case was upheld on appeal to the then Supreme Court. That decision was later followed by the Supreme Court in *KSM Insuran Bhd v. Amanah Chase Merchant Bank Bhd* [1992] 2 CLJ 1148; [1992] 1 MLJ 649.

The recent decision of the Federal Court, *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36; [1997] 1 MLJ 77 highlighted the three categories of cases that may be established to show cause to the contrary as envisaged by s. 256(3) of the NLC. They are –

> i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s. 340 of the Code;

ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and

iii) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity.

It was held that if no cause to the contrary could be shown, the court would be obliged to make an order for sale. The Federal Court also held that s. 256(3) NLC should be given a narrow and restrictive interpretation in order to give full effect to the legislative intent under s. 256 NLC, and that the duty of a judge hearing an order for sale application when examining the evidence said to raise a cause to the contrary is to objectively assess the factual materials and merely say whether they constitute such cause to the contrary. This court therefore, ought not "enter upon a discussion of the question whether any or all these complaints have or are devoid of any merit" (per Gopal Sri Ram JCA speaking for the Federal Court at p. 88 I of the report). The Federal Court further held that the chargor who had failed here was not left without a remedy when it said –

> We have said that s. 256(3) must be read narrowly. It does not, however, follow from this that the chargor who is unable to satisfy the court of cause to the contrary is left without any remedy whatsoever. Allegations that fail to amount to cause to the contrary may, as observed earlier, nevertheless form the basis of an action in personam against the chargee.

In *Low Lee Lian's* case, one of the complaints raised by the appellant was that the chargee bank had varied the interest rate without proper notice (similar to the complaint in this case). That complaint, it was held, was merely an allegation of a breach of a term of the annexure to the charge, insufficient to establish a cause to the contrary. To quote His Lordship Gopal Sri Ram again –

> An allegation that the chargee acted in breach of contract, while it may give rise to an independent action *in personam*, is insufficient per se to defeat the *ad rem* rights of a chargee under his registered charge to an order for sale.

Following the above authorities and having considered the complaints both in the preliminary objections and the evidence as deposed in the chargor's affidavit I hold that the chargor had failed to adduce sufficient materials to justify the witholding of an order for sale. As such, the chargee bank should be allowed the early recovery of their moneys due and realise their security through an order for sale as they sought in this application. It is pertinent here to again quote what the Federal Court said in *Low Lee Lian*, in support of my finding.

In the absence of such strong and compelling reasons as were present in *Narayanasamy* [1971] 2 MLJ 32 or *Lee Tan Hua* [1989] 1 MLJ 261 a court would not be justified in witholding relief to a chargee under s. 256 of the Code.

A sale by auction of the charged lands is now ordered fixed on 24 April 1999 at the premises of the High Court, Ipoh on the outstanding sum with interests as at the date of this order ie RM310,173.54.